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Ms. Charlotte Mooney  
U.S. Environmental Protection Agency  
Office of Solid Waste and Emergency Response  
Chief, Generator and Recycling Branch  
Hazardous Waste Identification Division  
(Mail Code 5304W)  
1200 Pennsylvania Ave., NW  
Washington, D.C. 20460

**Re: Request for Suggestions for Revision of Definition of "Solid Waste"**

Dear Ms. Mooney:

On March 13th, EPA published a notice amending certain regulations regarding mineral processing residuals in response to the D.C. Circuit decision in *Ass'n of Battery Recyclers v. EPA*, 208 F.3d 1047 (2000). 64 FR 11251. In that notice, EPA invited suggestions from the public as to potential future revisions to the regulatory definition of "solid waste" (DSW), in particular, revisions that would encourage more reuse and recycling throughout the United States.

The American Petroleum Institute (API) represents more than 400 member companies involved in all aspects of the oil and natural gas industry. API welcomes EPA's willingness to revise the DSW and recycling-related regulations, and we appreciate the opportunity to submit suggestions. We also commend your public statements placing a high priority on this effort. We appreciate the time that you, Ms. Horinko, and other staff have spent with interested parties to discuss this important issue. We especially appreciate the opportunity to meet with Ms. Horinko, you and other OSW staff, and other stakeholders on July 15.

We are submitting this letter to you for consideration in development of your proposed rulemaking concerning revisions to the definition of solid waste, which we understand is tentatively scheduled to be drafted by the end of this year. Increasing resource recovery is a major goal of RCRA, and we are eager to participate in this process and to work with EPA and others to seek appropriate revisions to the DSW that will help achieve that goal. We believe that revising the regulatory DSW to conform to the definition of "solid waste" in the Resource Conservation and Recovery Act (RCRA), as construed by the courts, would promote beneficial recycling and energy and resource conservation, while adequately protecting human health and the environment.

As you may know, API has for many years advocated that the existing regulatory definition of "solid waste" is overbroad and unlawfully inconsistent with the statutory definition.

API has participated in a number of lawsuits seeking clarification of the statutory limits on EPA's regulatory decision, including the landmark decision in *American Mining Congress v. EPA*, 824 F.2d 1177 (D.C. Cir. 1977), and the more recent decision in *API v. EPA*, 216 F.3d 50 (2000). API believes that RCRA and the relevant judicial decisions, including *ABR v. EPA*, limit the definition of "solid waste" solely to materials that have been "discarded" in the ordinary sense of that term. By contrast, the existing regulatory definition is far more sweeping, and purports to regulate many secondary materials that actually have not been discarded, including many materials that are – or otherwise would be – beneficially reused or recycled. Because of the enormous breadth of the regulatory definition, EPA over the years has been forced to adopt a patchwork of exemptions and exclusions to allow specific recycling practices or other re-use of secondary materials to proceed, albeit subject to various limitations and conditions. The result is a definition that is widely regarded as one of the most complex and confusing federal environmental regulations on the books.

The negative impacts of the current definition are well known. Among other things, it has caused widespread confusion and misunderstandings, spawned a series of costly and time-consuming lawsuits over a period of more than 20 years, and discouraged or prevented many legitimate efforts to recycle secondary materials and otherwise conserve energy and other resources. The last effect has been especially troublesome for the petroleum industry given the regulatory definition's general inclusion of materials recycled for use as fuels. In fact, the regulatory DSW's discouragement of recycling to produce fuels is even more troubling in light of the Administration's ongoing commitment to improving the Nation's energy supplies and energy security.

We understand that EPA is currently planning a narrow proposal for revising the regulatory definition of solid waste, i.e., to exclude materials being recycled outside of a "continuous industrial process within a generating industry" although EPA has not ruled out making additional, more far-reaching revisions at a later date. We also understand that this rulemaking is intended to be deregulatory, and that EPA does not plan to regulate materials or recycling processes that are not already regulated as solid wastes.

We are seriously concerned, however, that the narrow approach EPA apparently is now considering could result in situations where currently unregulated activities would become regulated. Moreover, that narrow approach – if finalized – would address only a portion of the revisions that the AMC I and ABR decisions contemplate, and would almost certainly result in more contention, more litigation, and the need for additional regulatory revisions in the future.

A narrow approach to the definition of solid waste now under consideration could bring currently unregulated materials under regulation. As you know, petroleum refineries generate a wide variety of hydrocarbon-containing products and residual materials. Often refinery residuals or products are reinserted into the refinery production process for further processing to make a fuel. However, certain residuals or product streams commonly may be sent to a petrochemical plant (often co-located with the refinery) in order for an element of the stream to be used or extracted for use in a chemical production process. The remaining material/residual is then returned to the refinery for further processing. If EPA adopts a definition excluding only reuse

of a material "within a generating industry," this type of shared production activity could become a regulated activity.

We urge EPA to consider a broader approach to reforming this important definition in order to clarify once and for all the scope of EPA's legal authority to regulate "solid waste," in accordance with the limits imposed by RCRA itself and with the court decisions rejecting EPA's prior assertions of authority. EPA should propose to define only genuinely "discarded" materials as solid wastes, or at least to exclude from the definition all recycled materials or practices that do not involve actual "discard."

At a minimum, we suggest that EPA seek comment on alternatives for revising the definition of solid waste. These alternatives could include the limited approach currently under consideration, as well as one or more broader options. By including several alternative definitions and inviting public comment on them, EPA could receive valuable input on issues of concern to the regulated community and more thoroughly frame the issues that need addressing. EPA then would have the option of adopting the best possible revision of the definition. API believes that including such broader alternatives, in some form, in the upcoming proposal would at least give EPA the flexibility to make fundamental changes in the definition in this one rulemaking, avoid the need for future additional rulemakings, and – in the long run – minimize the time and effort that EPA and other stakeholders will need to invest in this matter.

We would be pleased to work with you and other OSW staff to find a practical, effective and straightforward alternative to the current regulatory definition of "solid waste." We will contact you soon to request another meeting as soon as possible to discuss our suggestions in greater detail.

Sincerely,



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